



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OCT 27 2016

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

James C. Whelpley
2151 North Hamline Avenue
Roseville, MN 55113

RE: MUR 6794

Dear Mr. Whelpley:


The Federal Election Commission reviewed the allegations in your complaint received on March 11, 2014. On October 18, 2016, based upon the information provided in the complaint, and information provided by the respondents, the Commission decided to exercise its prosecutorial discretion to dismiss the allegations and close its file in this matter. Accordingly, the Commission closed its file in this matter on October 18, 2016.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). A copy of the dispositive General Counsel's Report is enclosed for your information.

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 52 U.S.C. § 30109(a)(8).

Sincerely,

Lisa J. Stevenson
Acting General Counsel

BY: 
Jeff S. Jordan
Assistant General Counsel
Complaints Examination and
Legal Administration

Enclosure
General Counsel's Report

16044403075

FACTUAL AND LEGAL ANALYSIS

MUR 6794

This matter was generated by a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended ("the Act") and Commission regulations by Emmer for Business and Jennifer Niska, in her official capacity as treasurer, (the "Committee"), Thomas J. Emmer, Integrity Exteriors and Remodelers, Inc. ("Integrity"), and Renters Warehouse. It was assigned as a low-rated matter under the Enforcement Priority System, by which the Commission uses formal scoring criteria as a basis to allocate its resources and decide which matters to

The Complaint alleges that the Committee accepted a prohibited in-kind corporate contribution from Integrity when Emmer appeared in its television and internet advertisement to recommend Integrity. In the video, Emmer states that he is a candidate for Congress and stands in front of an “Emmer for Congress” sign that contains a printed disclaimer reading “Paid for by Emmer for Congress.” Compl. at 2-5. In addition, the Complaint implies that Renters

² Renters Warehouse was inadvertently not notified of the Complaint. See 52 U.S.C. § 30109(a)

1 Warehouse made in-kind corporate contributions when Emmer appeared in its infomercials that
2 aired at least five times after he became a candidate and appeared as a special guest at its
3 “Cocktails and Conversation” event after Emmer became a candidate. *Id.* at 5-6.

4 The Committee and Integrity deny that any prohibited contribution resulted from the
5 advertisement. Committee Resp. at 1-2, 5; Integrity Resp. at 1-3. The Committee asserts that
6 Emmer filmed a testimonial regarding the quality of Integrity’s work at Integrity’s request, but
7 claims that Integrity was not authorized to broadcast it, and upon learning that the ad was being
8 aired, the Committee directed Integrity to stop. Committee Resp. at 3, David FitzSimmons Aff.
9 at 1. Integrity states that it aired the ad without the Committee’s knowledge or approval, and
10 states that the ad did not contain express advocacy. Integrity Resp. at 3. Respondents state that
11 after the Committee learned of the ad on September 29, 2013, the Committee requested an
12 invoice for the costs of airing the ad, Integrity promptly sent an invoice for \$850, and the
13 Committee paid it on October 14, 2013. Committee Resp. at 3, Ex. A at 11; Integrity Resp. at 1.
14 Thus, respondents deny the ad met the definition of a coordinated communication because the
15 Committee paid for it. Committee Resp. at 5; Integrity Resp. at 3.

16 As to the Renters Warehouse infomercial, the Committee states that it was created before
17 Emmer became a candidate, asserts that it does not satisfy the content prong of the
18 Commission’s coordinated communication regulations, and states that at the Committee’s
19 request, Renters Warehouse stopped airing the infomercial after Emmer became a candidate.
20 Committee Resp. at 2-3, 5. The Committee asserts that Emmer attended the “Cocktails and
21 Conversation” event as a radio station host, not in connection with his recently announced
22 candidacy. Committee Resp. at 2-3. The respondents argue that any potential violations are *de*
23 *minimis*. Committee Resp. at 1; Integrity Resp. at 4.

1 B. Legal Analysis

2 Corporations are prohibited from making contributions to federal candidates, and
3 candidates are prohibited from knowingly accepting them.³ A contribution is “anything of value
4 made by any person for the purpose of influencing an election for Federal office.”⁴ The term
5 “anything of value” includes in-kind contributions.⁵ When a political committee makes a
6 disbursement for the purpose of financing any communication through any broadcasting station,
7 the communication must include a proper disclaimer.⁶ All public communications by any person
8 that expressly advocate the election or defeat of a clearly identified candidate must also include a
9 proper disclaimer.⁷ Political committees are required to report contributions they receive.⁸

10 The available information indicates that Integrity’s television ad which identified Emmer
11 as a candidate, and included a sign reading “Emmer for Congress,” triggered the Act’s
12 disclaimer requirements.⁹ There is also information in the record that suggests that the ad
13 qualified as an in-kind contribution.¹⁰

³ 52 U.S.C. § 30118(a); 11 C.F.R. §§ 114.2(a), (d).

⁴ 52 U.S.C. § 30101(8).

⁵ 11 C.F.R. § 100.52(d)(1). Additionally, a third party’s public communication that is coordinated with a candidate is considered to be an in-kind contribution. See 52 U.S.C. § 30116(a)(7)(C); 11 C.F.R. §§ 109.21(b)-(d).

⁶ 52 U.S.C. §§ 30120(a)(1), 30120(d)(1)(B); 11 C.F.R. §§ 110.11(b)(1), 110.11(c)(3)(ii)-(iii).

⁷ 52 U.S.C. §§ 30120(a)(2)-(3), 30120(d)(2); 11 C.F.R. §§ 110.11(b)(2)-(3), 110.11(c)(4).

⁸ 52 U.S.C. § 30104(b)(2).

⁹ See 11 C.F.R. § 100.22(a) (listing “Smith for Congress” as an example of a phrase containing express advocacy).

¹⁰ There is information in the record supporting an inference that the ad may have met the definition of a coordinated communication. Specifically, Integrity created and initially paid for the ad, the ad appears to be a public communication containing express advocacy, and Emmer filmed a video testimonial at Integrity’s request. 11 C.F.R. §§ 109.21(a)(1) (paid for by a person other than the candidate or authorized committee); 109.21(c)(3) (a public communication that expressly advocates for the election of a candidate); 109.21(d)(1)-(3) (the communication is created by another person and the candidate assents to the creation of the communication; the candidate is materially involved regarding the content of the communication; and the communication is created after

1 The facts here, including the apparent *de minimis* amounts at issue, support dismissing
2 this claim as a matter of prosecutorial discretion. Although Integrity's ad may have been an in-
3 kind contribution, and it lacked a disclaimer saying that Integrity paid for it, Integrity apparently
4 only ran it briefly before pulling it from the air at Emmer's request. Respondents also attest that
5 all costs associated with the ad totaled \$850. After reviewing the ad, it appears to be an
6 unsophisticated ad for a small, local business, thus the Commission believes that the costs
7 associated with creating and broadcasting the ad were modest. Further, the Committee promptly
8 reimbursed Integrity for the costs of the ad.

9 As for the Renters Warehouse infomercial, the Committee denies that it satisfies any
10 content standard of the coordinated communication test,¹¹ and there is no evidence in the record
11 to the contrary. Further, it appears that the costs associated with the "Cocktails and
12 Conversations" event were likely small. Accordingly, based on the apparently small amounts at
13 issue in this matter, and in furtherance of the Commission's priorities relative to other matters
14 pending on the Enforcement docket, the Commission exercises its prosecutorial discretion and
15 dismisses the allegations pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985).

the person paying for the communication and the candidate who is clearly identified in the communication have engaged in one or more substantial discussions about the communication). See also 11 C.F.R. § 109.21(d) (any of the listed types of conduct satisfy the conduct standard whether or not there is agreement or formal collaboration); and 109.21(e) (agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication is not required for a communication to be a coordinated communication).

¹¹ 11 C.F.R. § 109.21(c).